

Hussaini (Migration) [2018] AATA 2336 (19 March 2018)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mrs Sima Hussaini
VISA APPLICANT:	Mr Ahmad Jawid Elham
CASE NUMBER:	1618096
DIBP REFERENCE(S):	BCC2015/1278339
MEMBER:	Ann Brandon-Baker
DATE:	19 March 2018
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Provisional) (Class UF) visa.

Statement made on 19 March 2018 at 3:29pm

CATCHWORDS

Migration – Partner (Provisional) (Class UF) visa – Subclass 309 (Spouse (Provisional)) – False document – Non-genuine marriage certificate – No compelling circumstances – Decision under review affirmed

LEGISLATION

Migration Act 1958, s 65

Migration Regulations 1994, Schedule 2, cl 309.225, Schedule 4, PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 6 September 2016 to refuse to grant the applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
5. The applicant applied for the visa on 29 April 2015. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.309.225 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the applicant provided a false document and thus failed to meet the requirements of Public Interest Criteria (PIC) 4020.
6. The review applicant appeared before the Tribunal on 7 March 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant. The Tribunal hearing was conducted with the assistance of an interpreter in the Hazaragi and English languages.
7. The review applicant was represented in relation to the review by her registered migration agent.
8. For the following reasons, the Tribunal has concluded that decision under review should be affirmed.

BACKGROUND

9. The parties provided the Tribunal with a copy of the delegate's decision along with their application for review.
10. The review applicant is an Australian permanent resident born on 25 December 1991 (26 years old). She arrived in Australia as a dependant on her mother's spouse visa in September 2011. She has declared no previous relationship or children. She is currently working as a hairdresser.
11. The visa applicant is a citizen of Afghanistan born on 21 September 1982 (35 years old). His parents and six siblings live in Afghanistan. He has declared no previous relationships or children.
12. The parties claim to have met for the first time in September 2013 in Kabul and were married on 21 September 2014 in Pakistan. The review applicant returned to Australia after their marriage in November 2014 and they have not seen each other since that time.
13. As part of their visa application the parties provided to the delegate a marriage certificate that was found to be not a genuine marriage certificate.
14. In response to the delegate when he put this matter to her, the review applicant claims that the marriage and documentation for the marriage were arranged by a person at the Afghan embassy in Peshawar who was introduced to them by their driver. The parties both claim that they believed the certificate to be lawful as it was collected from the authority itself.
15. The delegate did not find that there were any compelling or compassionate reasons sufficient to warrant a waiver in this instance.
16. Prior to the scheduled hearing the parties provided some screen shots of their text communications in Hararagi. The review applicant's movement records show that she

departed Australia on 6 July 2017 and returned on 5 September 2017. She has sent the Tribunal airline tickets showing that she travelled to Kabul via Bangkok and India on 5 September returning on 5 September.

17. The parties provided copies of some undated photographs of themselves together and with others. After the hearing, the review applicant also provided the Tribunal with a copy of a psychological report dated 13 March 2018 stating that the review applicant has a major depressive disorder and acute stress disorder. The report states that the review applicant's mental health is not stable and she requires resolution of her visa matter.

CONSIDERATION OF CLAIMS AND EVIDENCE

18. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.309.225 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
19. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

20. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
21. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or

information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.

22. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
23. At the Tribunal hearing the applicant told the Tribunal that she and the visa applicant were known to each other since around 2011 when she claims that he said that he noticed her and was interested in her. They met formally in 2013 for the first time but had spoken on the phone prior to the meeting. The visa applicant is a doctor and works at various locations around the country for around six months at a time. The review applicant had little knowledge of the visa applicant's activities and was unable to provide details of his activities or where he worked. The Tribunal put to the review applicant that it appeared that the visa applicant had a fascinating job and suggested that it seemed strange that she took so little interest in it. The review applicant said that he travels a lot and works for the Afghan government and is paid around USD\$600 a month.
24. The Tribunal questioned the review applicant about the document and she accepted that the document was fraudulent but she claimed that she had no way of knowing that. The Tribunal put to her that the Migration Act didn't require that she have knowledge that the document was fraudulent, only that she provided such a document in the course of making her application. Nevertheless, the Tribunal explored with both applicants their accounts of how they came to obtain the document and those accounts were inconsistent. The review applicant claims that they were introduced to an official by an Uber driver they happened to meet whilst shopping and the visa applicant claimed that the driver was known to his family.
25. The Tribunal further questioned the parties on what attempts they made to obtain an official, registered marriage certificate when the review applicant travelled back to Afghanistan in 2017 to visit the visa applicant for two months and again, their accounts were inconsistent. Their registered migration agent submitted to the Tribunal that the parties' accounts of their acquiring the marriage certificate were consistent with her experience of such matters in Afghanistan.
26. The parties claimed that they did not know anyone in Peshawar and assumed that they were given the correct information by the driver and the person whom they assumed was an official, although, according to the visa applicant they did not provide this official with their documents at the embassy, but at what appears to be a private address. Asked what aspect of their transaction appeared legal to him the visa applicant claimed that they were strangers there and didn't know anyone. The Tribunal put to the visa applicant that they knew at least 120 people who attended their wedding in Peshawar.
27. Be that as it may, it remains the uncontested case that the parties presented or caused to be presented a bogus document. As such, the Tribunal is satisfied that the visa applicant does not meet the requirements of PIC 4020(1).

Should the requirements of PIC 4020(1) be waived?

28. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the

granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.

29. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
30. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
31. The Tribunal explored with the review applicant whether she believed there were any compelling or compassionate circumstances that affected either the interests of Australia or the interests of an Australian citizen or permanent resident that justify the granting of the visa.
32. The applicant claimed that she had [medical] issues and had been prescribed medication. Asked what medication she had been prescribed she told the Tribunal that she was told by her GP to take [medication name]. She says that she can no longer live in the family home because she has some issues and conflicts within the family however she was unable to give the Tribunal any details about what circumstances existed within the family that would justify the granting of the visa.
33. The applicant said that nobody else in the family works but proceeded to say that her father and brother have a taxi business. The applicant's adviser asked for some additional time to prepare a submission to deal with these matters and the Tribunal allowed a further week. The applicant sent the Tribunal a copy of a [medical] report and some photos.
34. The applicant told the Tribunal it was not safe for her to go to Afghanistan to live with her husband as it was dangerous. She said that she cannot live without her husband.
35. The Tribunal has considered these matters in particular the [medical] report. The Tribunal accepts that the review applicant is fearful of returning to [Afghanistan], however the Tribunal notes that it is not so much that she requires [medication], or that it requires her regular attendance at a [health facility]. The Tribunal is not satisfied that there are any compelling or compassionate circumstances that justify the granting of the visa.
36. Therefore the requirements of PIC 4020(1) should not be waived.

CONCLUSION

37. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl.309.225. There is no evidence before the Tribunal that the applicant meets the criteria for any other subclass within the class of visa sought.

DECISION

38. The Tribunal affirms the decision not to grant the applicant a Partner (Provisional) (Class UF) visa.

A B Baker
Senior Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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